CIVIL PROCEDURE

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A survey of the Highest Tribunal's decisions on Civil Procedure for the year 1961 reveals one discernible trend, i.e., the decisions are merely reiterations of previous rulings and well-settled doctrines. In the attempt however to present a comprehensive survey, reference has been made to previous rulings and decisions of the Supreme Court because we believe in Justice Benjamin Cardozo when he said, "Study the wisdom of the past for in a wilderness of conflicting counsels a trail has there been blazed."

JURISDICTION AND VENUE

Venue distinguished from jurisdiction

An interesting case on this point arose in the case of *Samar Mining Co. v. Arnado.*[1] Rufino Abuyen filed with the Workmen's Compensation Commission a claim for injury and sickness contracted while in the service of Samar Mining Co. Labor attorney Tan set the hearing at Catbalogan, Samar. Petitioner assailed the order on the ground that the authority to hear was vested by Reorganization Plan 20-A and Executive Order No. 28 in the Regional Office No. 11 located in Cebu City, and hence beyond the function of Tan. Tan however pursued the hearing and awarded compensation to Abuyen. On March 24, 1960 petitioner instituted in the Court of First Instance of Manila the present action of certiorari and prohibition against respondent on the ground that the latter acted without jurisdiction and with grave abuse of discretion. The issue hinges on the interpretation of Sec. 1 Rule 5 and Sec. 4 Rule 67.

> Sec. 1, Rule 5—Civil Actions in the Court of First Instance may be commenced and tried where the defendant or any of the defendants reside or may be found or where the plaintiff or any of the plaintiffs resides at the election of the plaintiff."
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> Sec. 4, Rule 67—"Where Petition Filed—The petition may be filed in the Supreme Court or if it relates to the acts or omission of an inferior court or of a corporation, board officer or person, in a Court of First Instance having jurisdiction thereof."

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[1] G.R. No. L-17109, June 30, 1961.

Respondent contended that the Court of First Instance of Cebu should have jurisdiction and pursuant to Sec. 44(h) of the Judiciary Act that the CFI shall have the power to issue writs of injunctions, x x x x certiorari and prohibition in their respective provinces and districts in the manner provided in the Rules of Court." Petitioner contended that having established residence in Manila petitioner was entitled to bring the action in the CFI of Manila.

The Supreme Court held that the contention of the petitioner is untenable for the following reasons:

1. Sec. 4 Rule 67 which is entitled "Where Petition Filed" contemplates venue not jurisdiction, although it makes the former coterminous with or dependent upon the latter.

2. The jurisdiction therein alluded to is that over "corporation, board, officer whose acts are in question not jurisdiction over subject-matter of the case.

3. The rule-making power of these Court is limited to pleadings, practice and procedure; whereas to define, prescribe and apportion the jurisdiction of the various courts is within the exclusive power of Congress. Petitioner's theory would vest the CFI of Manila to issue writs of injunction, certiorari and prohibition affecting, corporation, board or persons outside the City of Manila which is denied to said court by the Judiciary Act. The action is directed against a given proceeding and the respondents are mere incidents thereof.

Court can determine whether venue is properly or improperly laid

Our Supreme Court has reiterated the ruling that it is for the court to determine whether venue is properly or improperly laid. In the case of *Isidro de Leon v Aragon et al.*,[2] it appeared that an action for ejectment was filed in the Municipal Court of Manila. The complaint averred that the defendant had his house on the land in question not stating where the land is situated. The complaint further alleged that the defendant is resident of Makati, Rizal. In a motion to dismiss, defendant alleged improper venue. However, the Municipal Court permitted the plaintiff to amend her complaint to show the location of the land in question. Insisting that the original complaint did not vest jurisdiction, defendant questioned the order for the amendment.

Held: The Municipal Court acquired jurisdiction over the subject-matter of the case being a suit for illegal detainer. As the court has acquired jurisdiction over the subject-matter, it can determine whether venue is properly or improperly made.

[2] G.R. No. L-17395, Oct. 30, 1961.

In another case,[3] a complaint for the recovery of a sum of money was filed by a resident of Quezon City against one domiciled at Caloocan, Rizal, but the latter's residence was not indicated in the complaint except that he might be served with summons at "Care of Boulevard Theatre, Manila", was questioned by the defendant alleging that the venue was improperly laid, the case having been filed at the Quezon City Court. *Held:* That the phrase "or may be found", contained in Sec. 1 Rule 5 is applicable only to cases where the defendant has two residences in the Philippines.

The venue was improperly laid.

Jurisdiction of the CFI

Under sec. 44 of the Judiciary Act of 1948, the Courts of First instance have original and exclusive jurisdiction in "all actions in admiralty and maritime jurisdiction, irrespective of the value of the property in controversy or the amount of the demand". In the case of *Insurance Co. of North America v. Manila Port Service*[4] the issue was whether the case involves admiralty, and therefore comes within the jurisdiction of the trial court. The facts reveal that, the plaintiff, as insurer of certain merchandise shipped at San Francisco, California, for Manila on board the S.S. President Tyler and consigned to the order of the Philippine Bank of Communications, Manila, filed the present action originally with the CFI of Manila for payment of the sum of ₱224.99 representing the value of the damage and short delivery of cases of evaporated milk which were unloaded into the custody of the defendant appellant, Manila Port Service as arrastre operator in the port of Manila. The MRR is included in the suit as the principal of the Manila Port Service.

In due time defendant filed a motion to dismiss on the grounds that: 1) the amount of damage being ₱2249.99, the case falls within the exclusive jurisdiction of the municipal court pursuant to Sec. 88 of the Judiciary Act of 1948; 2) the case is an ordinary civil action and not an action in admiralty and maritime jurisdiction of the CFI. The trial court held that the case involved admiralty and was within its jurisdiction to decide.

The Supreme Court reversed the trial court holding that the case does not involve admiralty and was not within the jurisdiction of the CFI. Reiterating the ruling in the case of *Macondray and Co. Inc. v. Delgado Brothers Inc.*[5] the Court said:

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[3] Manuel Portillo v. Don Luis B. Reyes, G.R. No. L-17707, Oct. 27, 1961.
[4] G.R. No. L-16573, November 29, 1961.
[5] G.R. No. L-131116, April 28, 1960.

"In case of controversy involving both maritime and non-maritime subject matter, where the principal matter involved belongs to jurisdiction of a court of common law or of equity, admiralty will not take cognizance of incidental maritime matters connected therewith but will relegate the controversy to the proper tribunal.

"To give admiralty jurisdiction over a contract as maritime, such contract must relate to the trade and business of the sea; it must be essentially and fully maritime in its character; it must provide for maritime services, maritime transactions or maritime penalties."

Amount of the claim determines jurisdiction

In the case of *Sandra Shaouy v Philip Shaouy*,[6] our Supreme Court reiterated the basic principle of our procedural law that the amount of the claim determines the jurisdiction of the court. Here the plaintiff prayed for ₱120,000 moral damages and ₱30,000 as exemplary damages, with legal interest in both cases and defendant set up a counterclaim for ₱50,000 as actual damages and ₱100,000 as attorney's fees. Both parties appealed from the decision of the CFI of Manila dismissing the complaint and counterclaim to the Court of Appeals which certified the case to the Supreme Court inasmuch as the claim of its party exceeded ₱50,000 which was the maximum of the value of the controversies then appealable to the Court of Appeals. Subsequently, however, the appelate jurisdiction was extended to cases in which the value in controversy does not exceed ₱200,000 and none of the parties herein claim more. The court then held that in view of the aggregate sum of money claim by each party and the issues raised by both, the case is therefore within the appellate jurisdiction of the Court of Appeals pursuant to Sec. 31 of RA 296 as amended by RA 2613.

The Supreme Court in several instances had remanded to the Court of Appeals cases where the value of the subject-matter does not exceed, ₱200,000, saying that "the exclusive jurisdiction of the Court of Appeals since the enactment of RA 2613 approved of Aug. 1, 1959 extends to all civil cases in which the value of the controversy does not exceed ₱200,000 exclusive of interest and cost." [7]

Interests and costs are not included in determining the amount for jurisdictional purpose. Thus in the case of *Mapa v Tait*,[8] although the aggregate amount of the claim is ₱284,407, this sum includes interest accrued before Oct. 13, 1958 deducting which the principal awarded would be ₱150,441.65 only and hence appeal is within the exclusive jurisdiction of the Court of Appeals.

[6] G.R. No. L-14517, Feb. 27, 1961.
[7] Alforque v. Mindanao Motor Lines Inc., G.R. No. L-13579, March 8, 1961.
[8] G.R. No. L-13239, March 24, 1961.

Sec. 88 of the Judiciary Act provides:

". . . where the claims or causes of action joined in a single complaint are separately owned or due to different parties, each separate claim shall furnish the jurisdictional test."

Thus in a case,[9] where the plaintiff numbering 53 in all have a claim against the defendant even if such claim exceeds ₱200,000, still the Court of Appeals should have appellate jurisdiction because the cause of action of each of the plaintiff is separate and distinct from that of others and the amount awarded in the judgment in the lower court in favor of theme varies ranging from ₱125 to ₱3,865. Such was also the ruling in the case of *Gundran v Red Lines Trans. Co. Inc.*[10] where although the sums claim by all of the appeallants aggregate to ₱429,523 the individual claims are very much less than ₱200,000 considering the fact that, as in original action, it is the individual clam and not the totality of such claims that is determinative of jurisdiction in this case because the amounts prayed for are alleged to be separately due to several appellants.

In one case,[11] the Court ruled that when a party has several claims for money against another arising from different transactions he may sue for the recovery of the total amounts in a single complaint. The totality of his claim exclusive of cost and interest determines the jurisdictional amount of the court.

The CFI has no jurisdiction to entertain disputes where the amount of the demand does not exceed ₱5000. Thus in the case of *Trinidad v. Yatco*,[12] the Court ruled that it is patent that the Justice of the Peace should have jurisdiction and hence orders of the CFI concerning the same are void *ab initio*.

Jurisdiction of the Court of Appeals to grant injunction in aid of its appellate jurisdiction

In the case of *G. M. Tuason and Co. v. Court of Appeals et al.*,[13] the Supreme Court took occasion to discuss the provision of section 30 of the Judiciary Act which provides that the Court of Appeals has jurisdiction to issue writs of mandamus, prohibition, injunction, certiorari, habeas corpus and all other auxiliary writs and processes in aid of its appellate jurisdiction. In this case a judgment rendered by the CFI of Rizal in ejectment cases was affirmed by the Court of Appeals. The CFI, after the Court of Appeals' decision became final and upon return of the records in due course, issued writs of execution, ordering the demolition of the houses of the evictees, Ro-

[9] *Supra.*
[10] G.R. No. L-15707, Nov. 3, 1961.
[11] ASEDECO v. Munsayac, G.R. No. L-14960, May 31, 1961.
[12] G.R. No. L-17288, March 27, 1961.
[13] G.R. No. L-18128, December 26, 1961.

sete and Dizon. A few days previously, landowner Tuason and Co. had also applied for a writ of prohibition in the CFI of Quezon City against the Land Tenure Administration to restrain them from expropriating "Tatalon Estate," the place where the evictees reside, alleging that the law allowing expropriation is null and void. Judge Caluag granted the preliminary injunction against the LTA. After the injunction was issued, the evictees, petitioned Judge Yatco to suspend the demolition of their houses on the ground that being tenants of Tatalon Estate and by virtue of Section 4, R.A. 2616, no jectment proceedings shall be instituted against the occupants of the Tatalon Estate while expropriation proceedings are going on. Judge Yatco, refused to suspend demolition on the ground that no expropriation proceedings has been instituted.

The evictees filed certiorari in the Court of Appeals against Yatco praying that the latter suspend demolition and the LTA to start expropriation proceedings.

The Court of Appeals granted preliminary injunction. The landowner, Tuason and Co. petitioned the Supreme Court to dissolve the injunction on the ground that the Court of Appeals has no jurisdiction to issue the injunction since it was not in aid of ts appellate jursdiction. The issue therefore was whether the injunction granted was in aid of its appellate jurisdiction. *Held:* The Court of Appeals had no jurisdiction to issue the writ of injuncton. The authority to issue the writ of injunction, etc. is limited by the statute to its issuance in aid of appellate jurisdiction, and it has been repeatedly held that the jurisdiction of the Court of Appeals to issue such writs must be based on the existence of a right to appeal to it from the judgment on the merits of the main case. Without such right of appeal, the Court of Appeals is without such jurisdiction to interfere for that Court is merely a creature of the statute. Since the prohibition case involves the constitutionality of R.A. 2616, an issue of which the Court of Appeals could not take cognizance, said court clearly had no authority to interfere by prerogative writ in either litigation for lack of appellate jurisdiction. The CFI judge who granted execution can disregard the injunction granted by the Court of Appeals.

Jurisdiction of CFI to hear cases involving the constitutionality of a law

In the case also of *Tuason,* it was urged that the CFI has no jurisdiction to entertain actions assailing the constitutionality of a law because Sec. 10 of Art. VIII of the Constitution prescribes that "no treaty or law maybe declared unconstitutional without concur-

rence of ⅔ vote of all members of the Court." It was contended that by this provision the jurisdiction of the Supreme Court to hear cases assailing the constitutionality of a law is exclusive.

The Supreme Court disregarded such contention citing Sec. 2 of Art. VII which provides that Congress cannot deprive the Supreme Court of its jurisdiction "to review, revise, reverse, modify or affirm on appeal, certiorari or writ of error as the law of Rules of Court may provide, final judgments and decrees of inferior courts:

"1. *In all cases in which the constitutionality or validity of any treaty, law, ordinance, executive orders or regulations is in question.*"

It is quite clear therefore that the 2/3 vote requirement of the Constitution to declare a law unconstitutional, refers only to decision of the Supreme Court in the exercise of its appellate jurisdiction, because this provision provided the manner by which the Supreme Court will exercise appellate jurisdiction over final judgments and decrees of inferior courts. So that this provision implies that judgments of inferior courts such as that of CFI may also involve questions affecting the constitutionality of a law. Undoubtedly, the CFI cannot declare a law unconstitutional, although it can hear a case assailing its constitutionality.

Jurisdiction over properties of non-residents

In *Leslie Brown v. Salud Brown* [14], it was held that before the rights of an absentee or non-resident over properties existing in the Philippines may come under the jurisdiction of Philippine Courts, summons must be served upon said absentee or non-resident by personal service, or by registered mail.

Interlocutory Jurisdiction

Section 88 of the Judiciary Act of 1948 grants to the Justices of the Peace of Provincial capitals of provinces and subprovinces, in the absence of the District Judge, the power to exercise interlocutory jurisdiction as the CFI, for all orders of the Court which are not final in character and do not involve a decision of the case on its merits.

So that, if the order is not interlocutory, but final in character, the jurisdiction cannot be exercised. In the case of *Allied Free Workers Union v. Estipona* [15] the CFI of Lanao del Norte rendered a decision in favor of *Cia.* Maritima against the petitioner. Due to the absence of the District Judge, *Cia.* Maritima submitted a motion

[14] G.R. No. L-17953, October 31, 1961.
[15] G.R. No. L-17934, December 28, 1961.

for execution in the Municipal Court of Iligan City which is the capital of the province, invoking section 88 of the Judiciary Act. The Court ruled that the Municipal court has no jurisdiction because the order of execution is not merely interlocutory but final in character, because its purpose is to enforce a decision of the merits rendered in the main case.

PARTIES, ACTION AND TRIAL

The erroneous designation of the representative of the defendant when the defendant itself is named, is not sufficient to set aside the proceedings. In the case of *Nilo et al. v. Romero*,[16] Fausto Nilo sued the City of Davao to recover payment for the use as roadway of a part of his land by the defendant City. A judgment was entered in favor of the plaintiff. Defendant, after the judgment has become final, filed a "petition for relief from judgment" alleging for the first time that the trial court acquired no jurisdiction over the defendant city of Davao, as it is the City Mayor who is under its charter, the right official to represent the city. In the proceedings had, the city engineer represented the city through the assistance of the city special counsel. The Court held that jurisdiction maybe acquired by voluntary appearance in court or by submitting pleadings in court which has jurisdiction over the subject matter. There is no dispute that summons were served upon the defendant city through the city engineer and that he was duly assisted by the city counsel. The appearance of the city attorney for and in behalf of the city of Davao constituted a voluntary appearance sufficient in law, to confer jurisdiction over it. If defendant City believed that it was wrongly represented its city attorney should have filed a motion to dismiss based on such grounds. Unfortunately, he did not. The doctrine of estoppel now operates against the respondent city of Davao.

Motion to intervene

Citing the case of *Bool v. Mendoza*[17], the Court amplified the construction given by it to the words "at any period of a trial" in section 1 of Rule 13. This was done in the case of *Concordio Trazo v. MAPECO*.[18] It appeared that in the case entitled *MAPECO v. Director of Lands*, the CFI ordered the respondents to execute a deed of sale in favor of petitioner. Subsequently, the petitioner filed in said case an omnibus motion for leave of Court to intervene, to set aside the decision of October 1959 and for a new trial alleging that

[16] G.R. No. L-15195, March 29, 1961.
[17] G.R. No. L-15339.
[18] G.R. No. L-16519, January 31, 1961.

he, not the MAPECO, was the actual occupant. The Supreme Court held that the case of the petitioner does not come within the purview of sections 1 & 3 of Rule 13 which he invoked as granting him the right to intervene; the phrase "at any period of the trial", has been construed to mean the period for presentation of evidence by both parties. Intervention may not be permitted after trial has been concluded.

Amendment of Pleadings

Section 2, Rule 17 provides:

> Sec. 2. By leave—The Court may upon motion at any stage of an action and upon such terms as may be just, order or give leave to either party to alter or amend any pleading, process, affidavit, or other documents in the cause to the end that the real matter in dispute and all matters in the action on dispute between the parties may as far as possible, be completely determined in a single proceeding but such order or leave, shall be refused if it appears to the court that the motion was made with intent to delay the action." [19]

In the case of *Felix Monte v. Ortega,*[20] plaintiff filed a complaint for replevin with damages against the defendant who were Mayor and Chief of Police respectively of Iriga Camarines Sur, stating that he was deprived of complete use and enjoyment of two cargo trucks by the defendants who for no valid grounds impounded the trucks which were being used by the plaintiff in a contract with the NPC. Defendants justified the seizure of trucks in consequence of continued and open violation of law, the same having been used as a means of committing the offense. On Dec. 1955 plaintiff filed motion for admission of amended complaint which included Provincial Fiscal Estipona, as party by alleging that original defendants in trying to escape liability had induced Fiscal to file information against hm, although they all knew that plantiff committed no offense at all. Defendant opposed admission of amended complaint on two grounds: 1) that substantial changes were included by way of damage greatly prejudicial to the defendant and 2) that it did not state a cause of action against the defendant. The lower denied motion to admit amended complaint. Facing the question of the propriety of the lower court's refusal to admit the amended complaint, the Court quoted the case of *Monte v. Morga* decided in 1951, "The rule that permits the amendment of the pleadings precisely authorizes the amendment in order that all matters in the action in dispute between the parties may as far as possible be completely

[19] Rules of Court.
[20] G.R. No. L-15417, August 29, 1961.

dealt with in a single proceeding. In the instant case there is ultimate relation between the allegations of the two causes of actions which can only be threshed out in a single proceeding. This attempt is within the purview of the Rule."

Elimination of two defendants in the amended complaint

Where the amendment eliminated as parties two defendants previously named in the original complaint and annexed thereto an agreement which is the basis of the action, the court ruled that the admission of the amended complaint did not constitute an abuse of discretion. It merely supplemented an incomplete allegation of the cause of action so as to submit the real matter in dispute. The theory of the action was not altered.[21]

Answer to Amended Complaint

> "Sec. 3, Rule 9—If the complaint is amended, the time limited for filing and service of the answer, unless otherwise ordered, run from the service of the amended complaint. An answer filed before the amendment shall stand as an answer to the amended complaint unless a new answer is filed within 10 days from notice of admission of the amended complaint."

Where the amended complaint contains no substantial changes, the defendant may not be served with summons anymore if in the original complaint he was already served with summons. Where the plaintiff presented the amended complaint after the defendant had already served an answer to the original complaint, he may not be served with summons anymore, if the defendant had already appeared in court when the amended complaint was filed. This rule will apply only in cases where the amended complaint does not contain substantial change, in which case even if defendant had been served with summons in the original complaints, another summons should be served upon him for the amended complaint. In this situation, simply sending the defendant of the amended complaint by registered mail is not equivalent to summons. But in the first situation ordinary service of the amended complaint upon him personally or by mail would be sufficient. In one case,[22] after the complaint was answered by the defendant, the plaintiff amended his complaint. This was admitted by the court, since there was no objection entered thereto. Defendant was already in court when amended complaint was admitted by the court. After the defendant was declared in default, he moved for the lifting of the default order,

[21] Jose Uy v. Oscar Uy, G.R. No. L-14743, June 30, 1961.
[22] G.R. No. L-14911, March 24, 1961.

arguing that he never came under the jurisdiction of the court for purposes of the amended complaint because same is not served him with summons in accordance with Sec. 10, Rule 27. *Held:* Amended complaint contained no new matter. It only sets forth the promissory note upon which action was based. Defendant already appeared in court when the amended complaint was served. We rule that after the defendant had appeared by virtue of the first summons, as in this case, he maybe served with amended complaint without another need of new summons.

Amendment of Complaint After Motion to Dismiss Has Been Filed

Can the court allow amendment of the complaint even after a motion to dismiss has already been filed? This was answered in the affirmative in the case of *Ong Peng v. Custodio.*[23] Plaintiff filed an action on April 15, 1958. On April 30, defendant moved to dismiss the case on the ground of prescription. Plaintiff replied and attached to his reply an amended complaint which set forth the promissory note supporting his claim. This was admitted by the court. Defendant argued that sec. 1 of Rule 17 giving right to plaintiff to amend his complaint once as a matter of right at any time before responsive pleading has been filed does not apply where a motion to dismiss has been filed and that the court should conduct a hearing before allowing the amendment. *Held:* Under sec. 3 of Rule 8, the court is not obliged immediately to conduct hearing on motion to dismiss. He may defer until trial, if the ground alleged therein does not appear to be indubitable. The right to amend under Rule 17, sec. 1 is a right which court should always grant otherwise mandamus will lie. This decision reiterated the Court's previous ruling in the case of *Breslin v. Luzon Stevedoring Co.*[24]

Interpleader

Sec. 1, Rule 14 of the Rules of Court provides:

> "Whenever conflicting claims upon the same subject matter are or may be made against a person, who claims no interest whatever in the subject-matter or an interest which in whole or in part is not disputed by the claimants, he may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves."

This provision was interpreted in the case of *Camilo v. Arcano.*[25] The facts of the case are as follows: Camilo and Francisco are

[23] *Supra.*
[24] 47 O.G. 1170.
[25] G.R. No. L-15658, September 29, 1961.

adjoining owners of foreshore lands in which in each piece of land are constructed commercial buildings for lease. The buildings in the two lots were burned. Ong Peng Kee, the leasee of Camilo, constructed a building in such a way as to encroach the portions occupied not only by Camilo but also by Francisco. Both sued Ong Peng Kee for forcible entry. Kee contended that he was just a mere leasee. He therefore filed an action for interpleader, compelling Camilo and Francisco tc litigate among themselves. The Supreme Court ruled that interpleader is not proper. Camilo only wanted the respdonent to vacate that portion of her property encroached upon. So with Francisco with respect to her own property.

In the same case, the Supreme Court also held that the complaint for interpleader would necessarily involve "title to or possession of real property or any interest therein" over which the justice of the peace court has no jurisdiction.

CONTINUANCE AND POSTPONEMENT

Sec. 2 of Rule 115 on continuance and postponement is addressed to the sound discretion of the court, but the exercise of which must be judicial and not arbitrary. Postponement and continuance of trial are part and parcel of our judicial system of dispensing justice and when no substantial rights are affected and the intention to delay is not manifest, it is sound judicial discretion to allow them.[26]

Motion for postponement may be granted without being verified

In the consideration of motion for postponement of trials as well as those for new trial, the court should take into account: first, the merits of the case, and second, the reasonableness of postponement—the rules pointing out to accident, surprise, or excusable neglect as reasons therefore. This is the holding of the court in the case of *George McEntee v. Perpetua Manotok*,[27] where an accident prevented the appearance of plaintiff's counsel. There was no certificate of illness presented. Hence the trial court dismissed the case for failure to prosecute. But the Supreme Court held that there was a showing on the part of the plaintiff of the fulfillment of the two requisites. Moreover, the lack of verification was satisfactorily explained.

Where valid grounds for postponement exists

Hap Hong Hardware Co., Inc. v. Phil. Milling Co.[28] involved

[26] G.R. No. L-16746, Dec. 30, 1961.
[27] G.R. No. L-14958, Oct. 27, 1961.
[28] G.R. No. L-16778, May 23, 1961.

an action to recover the value of hardware materials ordered by the defendant from the plaintiff which he promised to pay upon delivery. In the course of the trial, the defendants asked for several postponements, the reason for the second postponement being that the officers of the defendant company were attending another trial of a criminal case and the counsel also had to attend to a trial of still another criminal case. The subsequent petition for postponement alleged that the defendants' witnesses, officers of the company, had not come because it was already the beginning of the milling season in San Jose, Mindoro Occidental and their presence in the central was very necessary. The trial court rendered a decision in favor of the plaintiff, hence, the appeal was presented by the defendants. Holding the appeal to be without merit, the court said: "Various postponements were secured by the defendant prior to the last day set for hearing, showing an intention on defendants' part to delay the termination of the case. The reason adduced in support of the motion for postponement is not unavoidable and one that could not have been foreseen. Defendant ought to have known long before the date of the trial that the milling season would start when the trial of the case would start. The motion would have been presented long before the hearing so that the court would have taken steps to postpone the trial without inconvenience to the adverse party. Knowing as it should have known, that postponements lie in the court's discretion, and there being no apparent reason why the defendants could not have presented the motion, and then avoiding inconvenience to the adverse party appellant could not claim that the trial court erred in denying postponement.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

On this matter, Sec. 4 of Rule 27 of the Rules of Court provides:

> "Personal Service—Service of papers may be made by delivering personally a copy to the party or his attorney . . . If no person is found in his office, . . . then by leaving the copy, between the hours of eight in the morning, and six in the evening, at the party's or attorney's residence, if known, with a person of sufficient discretion to receive the same."

In the case of *Aldecoa v. Arellano,*[29] the respondent Judge rendered a decision against the petitioner. Copy of the decision was sent to the petitioner's attorney by registered mail and corresponding registry notice was sent to him on March 31, 1958. He failed to claim it and hence second and third notices were sent to him. Eventually, the petitioner's attorney claimed it on April 26. On

[29] G.R. No. L-18697, Sept. 25, 1961.

May 19, petitioner filed his notice of appeal, appeal bond and record on appeal which were denied by the respondent Judge on the ground that they had not been filed on time. *Held:* The said notices have been sufficiently and satisfactorily made and the requirements of the law had been complied with.

Court cannot proceed with the hearing if the defendant has not yet filed his answer, the time of filing not having yet expired

In the case of *Ramos v. Delizo, et al.*,[30] the defendant mailed his answer within the reglamentary period. The answer was received six days after the hearing set for the case. *Held:* As the answer was received only on Nov. 26, it is evident that the issues of the case were not yet joined when the hearing was held on Nov. 21. Notice given orally in open court is not sufficient.

The provision of Rule 27 prescribing modes of service are "mandatorily intended to provide a uniform procedure affecting a matter of public interest which may not be changed by the parties." [31]

In one case [32] for instance, the plaintiff filed a case of forcible entry and detainer against the defendant. The latter moved to dismiss the case on the ground that it did not state a cause of action. The motion was heard on May 17, 1958. On same day, the motion was denied and defendant was notified in open court of the denial, but the copy of the order of denial was received only on June 27, 1958. On June 30, he filed an answer, but the court declared him in default, it being of the opinion that the period to file the answer began to run on May 17, when he was orally notified. Citing the case of *Malga v. Delgado*,[33] the court held that notice given orally in open court is not sufficient and does not constitute service under Rule 27 of the Rules of Court.

Answer in cases of appeals from inferior courts to CFI

Upon the docketting of the cause under appeal, the complaint filed in the justice of the peace or municipal court shall be considered reproduced in the CFI and it shall be the duty of the clerk of court to notify the parties of that fact by registered mail and the period for making an answer shall begin with the date of the receipt of such notice by the defendant.[34]

In one case,[35] the defendant, instead of filing an answer upon receipt of the notice of the docketing of the cause, filed a motion

[30] G.R. No. L-14173, Aug. 31, 1961.
[31] Pineda v. Veloria, G.R No. L-15145, June 30, 1961.
[32] *Supra*
[33] 53 Phil. 23.
[34] *Supra*
[35] *Supra.*

to dismiss, which was denied. It was held that the 15-day period within which to file an answer is interrupted until he received the notice of the denial in the manner provided under Rule 27 of the Rules of Court.

JUDGMENT, EFFECT OF JUDGMENT, AND EXECUTION

Judgment on the pleadings is proper where the defendant admits all the material allegations in the complaint

In the case of *Apolario v. Chavez,*[36] the plaintiff filed a complaint demanding payment of plaintiff's articles. In their answer, the defendants admitted the indebtedness, but requested plaintiff to wait because the latter's accounts receivable had not yet been collected. Upon motion of the plaintiff, the court rendered judgment on the pleadings. *Held:* The pleaded excuse by the defendant is clearly no defense for a debtor cannot delay payment due just to suit its convenience. Hence, the judgment on the pleadings was proper.

Our Supreme Court has time and again stressed that a judgment is not confined to what appears upon the face of the decision but also those necessarily included therein and necessary thereto. In *Cipriano Unson v. Mayor of Manila,* et al.,[37] petitioner sued the Mayor of Manila and Genato Commercial to annul an ordinance whereby the corporation obtained by lease a certain lot plus permit to build thereon. The ordinance was declared a nullity. Hence the petitioner asked for the issuance of a writ of execution to remove the construction of the leased lot. Genato Commercial objected alleging that there was nothing contained in the decision that requires it to remove any building erected. *Held:* The parties practically conceded that if the ordinance was valid, Genato's construction stayed; but if invalid, the contract was void, the building had no reason to continue. To require Unson to institute another action for the demolition of the construction would be a cumbersome process.

Does award of ownership include award of possession?

Sec. 45 of Rule 39 provides:

> "What is deemed to have been adjudged—That only is deemed to have been adjudged in a former jugment which appears upon its face to have been so adjudged or which was actually and necessarily included therein or necessary thereto."

[36] G.R. No. L-17721, Oct. 16, 1961.
[37] G.R. No. L-13798, July 31, 1961.

Does the award of ownership include the award of possession? Yes, if the possessor is entitled to possession by virtue of a legal right. If he has no legal right to possession, the award of ownership of the property under his possession would include the giving of that possession to the person awarded the ownership.

This was illustrated in the case of *Perez v. Evite*.[38] In this case, the ownership of a parcel of land was awarded to the defendant. A writ of possession was issued to the sheriff "to deliver the possession of the portion of the land in litigation." Plaintiff moved that there is variance in the decision and writ of execution. Plaintiff cited cases of *Talena v. Garcia* [39] and *Jabon v. Alo* [40] where the court ruled in both cases that the declaration of ownership does not include adjudication of possession. "A person maybe declared owner but may not be entitled to possession. The possession maybe in the hands of the leasee or tenant. He may have improvements thereon which he cannot be deprived of without due hearing." *Held:* The pronouncement in these two cases was made having in mind situations where the actual possessor has a valid right enforceable against the owner. However, these rulings cannot be invoked here where no such right maybe appreciated in favor of the possessor. Plaintiff had not given any reason which would entitle him to retain the possession as against the true owner of the property in question.

In the case of *Macabenta v. Reyes*,[41] the dispositive part of the decision in an action for unlawful detainer reads: "Ordering Macabenta to pay the amount of ₱140 as rentals in arrears up to Jan., 1957 plus sum of ₱20 as monthly rentals *until he finally vacates the place.*" (Emphasis supplied).

The writ of execution reads: ". . . to cause defendant to remove from said premises and plaintiff have restitution of the same." Defendant contended that the decision did not authorize the sheriff to order him to vacate the premises. *Held:* While the dispositive part of the decision did not provide with desired clarity and definiteness that defendant should vacate the property, it is clearly inferable from that portion requiring petitioner to pay rent in arrears as well as monthly rentals until he *finally vacates the place.* That the decision had really such meaning and was so intended was subsequently shown by the fact that the respondent judge issued the writ of execution complained of.

[38] G.R. No. L-17187, March 29, 1961.
[39] 87 Phil. 173.
[40] August 7, 1952.
[41] G.R. No. L-14898, Sept. 21, 1961.

Execution of Judgment in Amicable Settlement

If the judgment is final, not interlocutory, and the time to appeal has expired, and no appeal had been perfected, the judgment rendered may be said to have become executory and the prevailing party in entitled as a matter of right to its execution.[42] It becomes the court's ministerial duty to issue the writ of execution.[43] This rule refers only where the judgment is complete and certain in itself. It does not refer to a situation where the judgment requires the performance of a condition or obligates the parties or one of them to do a certain act. In such cases, the court must find out whether the conditions were complied with. Thus, in the case of *Cotton v. Almeda Lopez*,[44] the plaintiff and defendant Baltao reached an amicable settlement and compromise agreement on a pending civil case which was approved by the respondent judge. On Nov. 19, 1957, one year and four months from the execution of the agreement, plaintiff filed before the respondent judge, a motion for the execution of the judgment praying that an order be issued directing the respondent Baltao to comply with his commitment under the said compromise agreement. Respondent judge denied the motion for execution for the reason that respondent Baltao had substantially complied with the terms of the compromise agreement. Petitioner contended that execution in his favor is matter of right. *Held:* Rule refers only to judgment which is complete and certain. It does not refer to judgment where conditions are to be complied with first. In such cases the court must find out if the conditions are complied with. Although judgment by consent are just like any other judgment, it partakes of the nature of a contract and must be enforced as such. The judgment here is by consent and requires some definite acts from the parties and discretion of trial court on this matter is not to be interferred with.

Petition for relief

Sec. 1 of Rule 38 of the Rules of Court provides, namely:

> "When a judgment is rendered by an inferior court, and a party to the case by fraud, accident, mistake or excusable negligence has been unjustly deprived of hearing therein, or has been prevented from taking an appeal, he may file a petition in the court of first instance of the province in which the original judgment was rendered, praying that such judgment be set aside and the case tried upon its merits."

[42] Fiesta v. Llorente, 24 Phil. 554.
[43] Buenaventura v. Garcia, 78 Phil. 759.
[44] G.R. No. L-14113, Sept. 19, 1961.

The above Rule was properly construed by our Supreme Court in the case of *Fructuoso Alquesa at al. v. Blas Cavada, Jr., et al*[45] when it said that "a motion to vacate judgment under Rule 38 must be accompanied with affidavits showing the fraud, accident, mistake or excusable negligence relied upon and the facts constituting the petitioner's good and substantial cause of action or defense which he may prove if his action be granted."

Another case on this point is that of *Mauricio Cordulan v. Cesareo Cordulan,*[46] wherein petitioner's petition for relief from a final judgment of default was rightfully denied by the lower court for failure to show that there was fraud, mistake, accident or excusable negligence in the failure of his lawyer to timely join issues with the plaintiff.

Writ of Execution

A writ of execution may be enjoined if there is still a pending case determining the ownership of the subject matter in question. Thus in the case of *Singbengco v. Arellano,*[47] a writ of execution was enjoined by the respondent. Petitioner filed a preliminary injunction to nullify the order enjoining the writ of execution. *Held:* The respondent judge did not abuse his dicretion. It has declared in a previous case that the award of lot No. 309 to Singbengco and Nichols was tainted with fraud and reconsidering and setting aside the adjudication to them. As a consequence of the decision in that case, the cadastral and land registration case in question was remanded to the court of origin for further proceedings in the cadastral case to determine the ownership of lot 309. The respondent judge was right in waiting for the outcome of the proceeding.

In the case of *Nestora Rigor vda. de Quiambao, et al. v. Manila Motor Co., Inc., et al,*[48] it was held that a valid execution issued and levy made within the five-year period after entry of the judgment may be enforced by sale thereafter, provided the sale is made within 10 years after entry of the judgment.

Court given ample discretion to direct an act to be done by some other persons

The case of *Marcelo Caguioa, et al. v. Bacolod-Murcia Corp., et al.*[49] is illustrative of said power of the court. It appears in this case that the members of the respondent corporation filed a

[45] G.R. No. L-16735, Oct. 31, 1961.
[46] G.R. No. L-17722, Oct. 9, 1961.
[47] G.R. No. L-16269, March 2, 1961.
[48] G.R. No. L-17384, Oct. 31, 1961.
[49] G.R. No. L-13824, Oct. 31, 1961.

petition for a writ of mandamus to compel permit agent of the sugar administration to sign their quedan permit. By order of Dec. 6, 1957 the court ordered the district sugar supervisor to sign the permit in lieu of the permit agent who absented himself from the jurisdiction of the court. The Supreme Court, taking into consideration the extreme urgency of the case, said that the respondent judge had to exercise his power to expedite the proceedings (Sec. 7, Rule 67). The directive contained in the order is sanctioned by Sec. 10 of rule 39.

In the case of *Jose Galvez, et al. v. Phil. Long Distance Tel. Co.*,[50] it was held that a final order of the court is no longer subject to alteration or modification especially so when said order has already been affirmed by the court *en banc* and appeal by *certiorari* from said order was dismissed for lack of merit.

Our courts generally are hesitant to grant execution before the expiration of the time to appeal in cases involving occupancy of public offices. This was shown in the case of *Tabuena v. Court of Appeals, et al.*,[51] wherein it appeared that in Civil Case No. B-152, the lower court ordered respondent Eugenio de la Cruz to appoint petitioner to the position of administrative assistant in the forest research institute. Pending appeal, respondent was ordered to appoint petitioner. The court then held that if the judgment is executed and on appeal the same is reversed although there are provisions for restitution, oftentimes damages may arise which cannot be fully compensated. As a solemn trust occupancy of a public office cannot accommodate the vagaries of personal fortunes.

In the subsequent cases of *Angel Villarica, et al. v. Concepcion Gil, et al*,[52] and *Concepcion Gil v. Nieves Gil*,[53] the Supreme Court ruled that where the party directed to execute the conveyance of land refused to comply with the order, the Court was right in directing the sheriff to do the act and the act done had the same effect as if it was done by the party. It further held that where the decision and the writ of execution issued did not state what specific portion of the lot was to be conveyed, the sheriff had no authority to determine such portion.

Execution before expiration of the time to appeal must be based on good reasons

Our Supreme Court, in the case of *Retadulla, et al v. Benitez*,[54] took the opportunity to stress the fact that an execution to be is-

[50] G.R. No. L-16370, Oct. 31, 1961.
[51] G.R. No. L-16290, Oct. 31, 1961.
[52] G.R. No. L-15799, Aug. 31, 1961.
[53] G.R. No. L-15805, Aug. 31, 1961.
[54] G.R. No. L-15971, July 31, 1961.

sued before the appeal period has prescribed should be based on just and reasonable grounds. In the aforecited case the Court rendered judgment against the bailbonds of the petitioner and ordered them forfeited. Their motion to set aside the judgment having been denied, petitioner appealed to the Supreme Court. Despite the pendency of the appeal respondent Provincial Sheriff called a public auction sale of the properties given as bail. The court said, "Considering that the lower court has reconsidered its stand and finally allowed the petitioner's appeal which is then pending decision, the interest of justice would be better served if the sale of execution be held in abeyance until after the appeal has been disposed of."

An interesting case decided by the Court, is that of *Mendoza v. Alano, et al.*[53] Here an action for forcible entry and detainer was filed and judgment was rendered against defendants awarding possession of two parcels of land occupied by the defendants in favor of Mendoza. The clerk of court issued writ of execution, to command the defendants Alano and Salcedo to vacate premises, and to deliver the same to the plaintiff and ordered the City Sheriff to restrain and desist said defendants from possessing and benefiting from the land in question. Both the defendants refused to vacate the said premises and the Sheriff was not able to deliver same to the plaintiff. A motion to declare the defendants in contempt was filed and order declaring them in contempt was issued by the lower court. Sustaining the appeal the Supreme Court held: "The judgment of the lower court is for delivery of possession of a piece of land to the plaintiff. By express provision of the Rules, such kind of judgment must be executed in accordance with par. d, Sec. 8 of Rule 39 and not Sec. 9 thereof."

The execution must issue in the name of the Republic of the Philippines from the court in which such judgment or order was entered; must intelligibly refer to such order or judgment, stating the court, province and municipality where it is of record and the amount actually due thereon if it be for money; and it must require the Sheriff or other proper officer to whom it is directed substantially as follows: "If it be for the delivery of the possession of real and personal property to deliver the possession of the same describing it to the party entitled thereto, to satisfy any cost, damages, rents or profits covered by the judgment out of the personal property and if sufficient personal property cannot be found, then out of the real property. The clerk of court had no authority to treat the judgment as a special judgment and to issue the writ in accordance with sec. 9, Rule 39. He should have directed the writ

[53] G.R. No. L-18757, Sept. 18, 1961.

to the sheriff for the latter to place the plaintiff in possession of the premises in accordance with sec. 8, par. d of Rule 39, instead of directing the writs to the defendants themselves. Legally, speaking there was therefore no valid writ issued and consequently, no legal and valid order was displayed by the defendants."

Writ to levy execution issued by one court cannot be enjoined by another coordinate court

In the case of the *National Power Corporation v. City of Baguio*,[56] the CFI of Manila, rendered a decision ordering the City of Baguio to pay its debt to the National Power Corporation. A writ was issued to levy execution of the property of the City of Baguio, consisting of cash deposits in the PNB branch in Baguio City.

The City of Baguio, filed in the CFI of the City of Baguio, a writ of preliminary injunction claiming that garnishment was illegal contending that cash deposits are exempt from execution. The court granted the execution prayed for. The issue hinges on whether the CFI of Baguio can grant injunction over order granted by the CFI of Manila. *Held:* The CFI of Baguio has no jurisdiction. Garnishment of property to satisfy writ of execution "operates as an attachment and fastens upon the property a lien by which property is brought under the jurisdiction of the court issuing the writ. It is brought under *custodia legis*, under the sole control of such court. A court which has control over such property exercises exclusive jurisdiction over the same. No court except one having supervisory control or superior jurisdiction in the premises has right to interfere with and change that possession." The reason advanced by the CFI of Baguio that it should grant relief "when there is apparent illegal service of the writ," may not be upheld; there being a better procedure to follow, a resort to the Manila court. To allow coordinate court to interfere might result in confusion and seriously hinder the administration of justice.

Res judicata:

Sec. 44, Rule 39, par. h provides:

> Effect of a judgment or final order rendered by a court or judge of the Philippines, having jurisdiction to pronounce judgment or order may be as follows:
>
> . . . the judgment so ordered is in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceding,

[56] G.R. No. L-15763, Dec. 22, 1961.

litigating for the same thing and under the same title and under the same capacity.

In the recent case of *Tuballa v. Maria de la Cruz*,[57] it was held that dismissal of actions for lack of personality of the plaintiff may bar subsequent case on the same subject matter. The appellant argues that since dismissal was for lack of personality, it is not an adjudication of the merits and hence it will not bar subsequent action of the same subject-matter. *Held:* While the dismissal was not made after the presentation of evidence or after trial, it cannot be said that the same is not an adjudication of the merits. Under sec. 4 Rule 30, any dismissal of the case predicated under sec. 2 of said rule or under sec. 1 of Rule 8, operates as an adjudication upon the merits unless the court expressly directs that the dismissal is without prejudice. The only exception is when the dismissal is based on lack of jurisdiction.

In one case,[58] there was an amicable settlement approved by the court between two co-owners awarding the land to the other for valuable consideration. When the awardee of the land sold the same to a third person, the previous co-owner claimed one-half of the purchase price, as his share alleging that the awardee of the land did not comply with the terms and conditions of the amicable settlement. *Held:* Claim is now barred by prior judgment. If the other party did not pay the stipulated ₱300 in the amicable settlement, the remedy is to file a motion for the execution of that portion of the judgment and not litigate anew the same property which has been the object of settlement in the former case.

There should be same subject-matter, same parties and same cause of action. This was illustrated in the case of *Aborde v. Velasco* [59] wherein defendant took possession of parcel No. 111 after having been awarded ownership thereof in an action between defendant on one side and Maria Aborde and her husband on the other side.

The present complaint prayed that Maria Aborde and her cousin be declared joint owners not only of parcel No. 111 which was previously the object of litigation but also of parcels 1 and 11, the judgment of the Court of Appeals affirming the decision be set aside, the same having been obtained by defendant through fraudulent means and machination by presenting in said case falsified and forged exhibits. Defendant filed motion to dismiss on the ground of prior judgment. Trial court denied motion on the ground that there is no *res judicata* because there is no identity of the parties, (in the

[57] G.R. No. L-13461, March 20, 1961.
[58] Valdez v. Octaviano, G.R. No. L-16427, March 20, 1961.
[59] G.R. No. L-15129, June 30, 1961.

first case, Maria Aborde and her husband were the plaintiffs, while in the present case, plaintiffs are Maria Aborde and her cousin), and that there is a difference in the subject-matter involved. In the first case only parcel 111 was involved, now parcels 1 and 11 are included. It was held by the court that there is still *res judicata* and that the previous case bars the present action. Although the first plaintiffs Maria Aborde and her husband is different from Maria Aborde and her cousin, still there is privity of interest, between the plaintiffs in the first and the second cases. While parcel 1 and 11 are included, still such can't change the effect of *res judicata* because the decision of the first case involving parcel 111 would require the same amount of evidence as the present action, in order to dispose of the latter case. The allegation of the plaintiffs that the first case was characterized by the admission of false and forged documents, cannot now be entertained by this court because judgment had long been final. The fraud involved, granting that such fraud really existed, can't be set aside because such is intrinsic.

In the case of *Licup v. MRR*,[60] petitioner filed action for mandamus against the GSIS and MRR alleging that he was separated from the service of the MRR under RA 422, and that he was entitled to be retired under RA 660, sec. 20. Lower court found that the separation of the petitioner from MRR Co. was not due to RA 422, and that he was not entitled to retirement. The case was dismissed. Licup, didn't appeal from the order of dismissal. More than two years later, he filed in the CFI of Manila, another complaint also against the MRR and the GSIS alleging substantially the same facts and same relief except that he added thereto damages and attorney's fees. Upon motion of the defendant, the court dismissed the complaint as being barred by prior judgment. Licup contended that there was no dismissal on the merits and that there is no identity in the two causes of action. *Held:* "There is definitely an identity of the parties and causes of action. Both cases were filed by him against the GSIS and the MRR Co. and both raised exactly the same issue or cause, i.e., appellants supposed right to retire under the provision of RA 660. Even the relief sought in the two cases are the same—to allow appellant to retire under RA 660 as amended and to allow him to recover from the defendants, attorney's fees and costs.

It was contended that as the order of dismissal was rendered on the motion to dismiss on the ground that the complaint didn't state a cause of action, the merits of the case was never presented to the trial court for decision and said dismissal was not an adjudi-

[60] G.R. No. L-16196, May 30, 1961.

cation of the merits under the *res judicata* rule. The court said that there is no merit to this contention. Rule 30 provides: "Unless otherwise ordered by the court, any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction operates as an adjudication upon the merits." Under the rule therefor, dismissal of the first case not being one for lack of jurisdiction nor comprised under Rule 30, is an adjudication on the merits and therefore precludes another action based on the same.

In *Sarabia and Leido v. Sec. of Agriculture and Natural Resources*,[61] it appeared that in 1951 petitioner Sarabia and Leido filed individual fishpond applications with the Bureau of Fisheries over 100 ha. each of public land located in Oriental Mindoro. A year later Lardizabal filed a similar application concerning public land in the same barrio. At the time they filed their applications, the areas applied were still part in a commercial forest and was not available for fishpond purposes. It was only in February, 1953 that said areas were disestablished and on March, 1953 it was certified by the Director that said areas were now available. The Director disapproved the application of Lardizabal on the ground that the portion applied by him was that awarded already to Leido. Ordinary fishpond permits were issued by the Secretary of Agriculture and Natural Resources to Sarabia and Leido. On complaints of Lardizabal, the Secretary modified the award and reduced it from 50 ha. each to 33⅓ ha. giving Lardizabal 33⅓. They filed certiorari with the CFI of Manila to annul said order of the Secretary for having been issued without and in excess of jurisdiction. Trial Court dismissed the action for failure to exhaust administrative remedies. He should have appealed to the President of the Philippines. Since no appeal was made during that time, lower court dismissed the action. Later the two petitioners filed another petition, this time for prohibition in the CFI of Manila claiming the nullity of the amendatory order of the Secretary, on the ground that it is barred by the prior judgment. *Held:* The basic contention and cause of actions of the petitioners' petition for certiorari and prohibition are the same—the alleged nullity of the amendatory order of the Secretary on the ground that the appeal of Lardizabal was filed out of time. The parties in the two cases are also the same; the remedy and the relief sought are likewise the same—the nullification of the order of the Secretary. The dismissal was a dismissal on the merits and as the petitioners' appeal from the judgment of the lower court to this Court was dismissed for having been filed out of time said judgment have become final and res judicata

[61] G.R. No. L-16002, May 23, 1961.

in all subsequent actions or suits in the same point and in all matters raised in said petition by the petitoners. It is of no moment that the present petition is one of *prohibition* while the former was for *certiorari* since both petitions raised the same cause of action and are based exactly on the same ground. They cannot vary their form of action or adopt a different method of presenting their case to escape the effects of *res judicata*.

PETITION FOR RELIEF

Negligence as ground for new trial must be excusable

In the case of *Ramos et al. v. Antonio*,[62] a judgment was rendered declaring defendants in default and an award was given in favor of the plaintiff after the presentation of evidence. Defendants filed motion for new trial alleging that their failure to appear was due to excusable negligence, which ordinary prudence could not have guarded against. The reason advanced by them was that their counsel received on March 24, 1956 or six months before the hearing a registered envelope containing a notice of the hearing. But the envelope was lost before he knew what it was all about and before he had an opportunity of opening it and knowing its contents. *Issue:* Does the omission to open the envelope constitute excusable negligence as to entitle defendants to new trial? *Held:* Allegation of the counsel is flimsy. It does not constitute the mistake and excusable negligence contemplated by the Rules of Court. The exercise of ordinary prudence could have avoided and guarded against such mistake. He did not perform ordinary prudence because he failed to do his routine job or duty of noting down the hearing in his calendar. Lawyers should be vigilant and alert in order to safeguard properly the interests and rights of their clients.

Fraud must be extrinsic or collateral

Where the decision sought to be set aside was due to the admission by the trial court of the supposedly false or forged document, said judgment cannot be annuled on ground that fraud is intrinsic in character. As a general rule extrinsic or collateral fraud would warrant a court of justice to set aside or annul a judgment based on fraud.[63]

Fraud by co-defendant is not sufficient to annul judgment in favor of the plaintiff

This was illustrated in the case of *Villeza v. Olmedo*.[64] In this

[62] G.R. No. L-15124, June 30, 1961.
[63] Veloso v. Aborde, G.R. No. L-15129, June 30, 1961.
[64] G.R. No. L-15672, March 24, 1961.

case the CFI of Leyte rendered judgment awarding ownership of land to plaintiff. Tui Tin, one of the co-defendants filed a "petition for relief" from the judgment on the ground that he never learned nor understood that he was a co-defendant; that the decision has been secured through fraud because his co-defendant Olmedo had assured him that he would take care of the litigation and that he (petitioner) was merely a witness in the case and that the hiring of the lawyer would be taken cared of by the co-defendant Olmedo. In the case however, petitioner testified, after having been summoned by the court.

Held: He cannot profess ignorance. If it is true that he relied on the assurance of his co-defendant Olmedo, his remedy is against the attorney who allegedly failed to protect his interest. Supposing that he was a victim of fraud by his co-defendant such fraud won't affect the rights of the plaintiff who had obtained judgment after trial and after submitting evidence which at this stage would be conclusively presumed to be sufficient. If his co-defendant colluded with the plaintiff a different situation might arise.

Must be supported by affidavits of merits

Judgment was entered against defendant after he had been declared in default. On July 1, 1957 defendant filed verified motion for reconsideration. The motion was not accompanied by affidavits of merits. On Feb. 1, 1958, defendant filed again a verified motion for reconsideration now supported by affidavits of merits. *Held:* The original motion for reconsideration was patently defective and to give due course to the amended motion filed seven months later would in effect be allowing the defendant to file the motion beyond the period fixed by the Rules of Court, which is only six months according to Rule 38.[64a]

Where judgment was rendered by court without jurisdiction

In the case of *Trinidad v. Yatco*,[65] the CFI rendered a judgment on the subject-matter the value of which is less than ₱5000 and hence under the exclusive jurisdiction of the Justice of the Peace. The petition to set aside was filed three months later after the judgment was promulgated. *Held:* The judgment may still be annuled, even if the motion to set aside was filed out of time and after the decision has long been final "Lack of jurisdiction over the subject-matter may be assailed either directly or collaterally. It may be

[64a] Castañeda v. Ago, G.R. No. L-15927, June 30, 1961.
[65] *Supra*

said to be a lawless thing which can be treated as an outlaw and slain at sight whenever and wherever it exhibits its head." [65]

The affidavit of merits is a substantial requirement. So that if it is not contained therein or not under oath, it is fatal. Mere assurance that defendant has a good and valid defense is not sufficient.[66]

APPEALS

Motion to set aside if merely pro-forma does not suspend period to appeal

In the case of *Fonacier v. Surtida*,[67] Fonacier received notice of judgment against him on Feb. 5, 1959. On March 4, he filed a petition to set it aside. This was denied and notice of denial was received of July 24. The next day, July 25, he filed notice of appeal, appeal bond and record on appeal. Lower court denied the appeal on the ground that it was filed out of time. Evidently, the reason advanced by the lower court was that the petition was merely proforma and hence did not suspend the period of appeal. The Supreme Court in reversing the decision took into consideration the contents of the petition and from it the court deduced that the petition asked that the decision be set aside because it was not supported by evidence and gave the reasons therefor. The fact that it was not well-founded and that it was not the proper remedy is immaterial in suspending the period to appeal.

Appeals must be perfected on time

Plaintiff through original counsel, received notice of judgment on July 25, 1957. Subsequently, plaintiff changed her counsel without making a formal petition. The new counsel filed a verified motion for reconsideration on Aug. 7. Appellants record on appeal was filed on Sept. 12. *Held:* The period of 30-days within which to perfect an appeal commenced to run from July 25 and ended on Aug. 25. The running of the period has not been interrupted by the filing of the petition for reconsideration. Neither was it interrupted by the change of the counsels inasmuch as the Rules of Court require formal petitions whenever there is change of counsels.[68]

Issues not raised in the justice of the peace courts cannot be raised in the courts of First Instance on appeal

Before the justice of the peace courts, defendant made a verbal denial of the allegations of the complaint. On appeal, the defendant

[66] G.R. No. L-16196, March 30, 1961.
[67] G.R. No. L-15944, Sept. 28, 1961.

filed his answer containing denials and several counterclaims. Plaintiff moved to dismiss the counterclaims on the ground that the issues raised in the counterclaims were not raised in defendants answer at the justice of the peace court. *Held:* The Rules expressly provides that upon appeal from the judgment of the justice of the peace court to CFI, the case shall stand for trial *de novo*. This provision has been interpreted to mean that parties are prevented from raising issues in the CFI which were not raised in the justice of peace courts.[69]

Right to appeal from order of default

As a general rule a person declared in default loses his standing in court. He is not entitled to any notice nor can he appeal. But this was modified in the case of *Fernandez v. Caluag*.[69a] In this case, copies of the summons and complaint were sent to Arenas, at AIB Avenue on March 16, 1959. The latter delivered the copies to Fernandez on April 4. On same date Fernandez, asked for extension to file answer up to April 14, on the ground that copies were sent to Arenas, her leasee, and that the latter delivered the copies to her late. She filed answer on April 8, but on April 11, she was declared in default. She filed motion to set aside default order but this was denied. Petitioner then filed notice of appeal, but trial court denied said appeal on the ground that having been declared in default she loses her standing in court. *Held:* From order denying the petition to set aside order of default, petitioner is entitled to appeal. The disallowance of appeal constitutes an unlawful exclusion of the petitioner from her use and enjoyment of her statutory right to appeal. It was also held in this case that it is not necessary to file a motion for reconsideration.

Trial Court cannot order the amendment of the record on appeal after it has approved it and ordered its transmission

Thus in the case of *Gosienfiao v. Yatco*,[70] thirteen days after it has approved the record on appeal the lower court made this order: "Considering that through oversight this court approved the record on appeal, the defendant is hereby given 10 days from receipt hereof within which to amend the record on appeal accordingly." *Held:* Taking sec. 9 in relation to sec. 11 of Rule 41 the court below no longer had power to order the amendment of the record on appeal especially against the opposition of the defendant.

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[68] Baquiran v. Court of Appeals, G.O. No. L-14551, July 31, 1961.
[69] Tabuena v. Court of Appeals, et al., G.R. No. L-16290, Oct. 31, 1961.
[69a] G.R. No. L-16124, Dec. 30, 1961.
[70] G.R. No. L-16676, Jan. 22, 1961.

Record on Appeals

Regarding matters to be included in the record on appeal, the same should be addressed to the sound discretion of the judge who heard the case and is aware of the questions and the issues that have been raised and which might again be raised on appeal.[71]

The charter of Manila which created the Juvenile and Domestic Relations Court provides that decisions and orders of that court shall be appealed in the same manner and subject to the same conditions as appeals from the Court of First Instance.[72]

Dismissal of Appeals

After the briefs are filed, the dismissal of the appeals rests upon the sound discretion of the court. In the case of *Yorac v. Magalona,*[73] Yorac filed petition to review a decision of the Court of Appeals. When the case was already considered submitted for decision, Magalona moved to dismiss the appeal on the ground that it has already become moot, the case being an election protest involving the office of the municipal mayor, in connection with the 1955 election the terms of which expired in 1959. Petitioner contended that should the appeal be dismissed before a decision could be rendered by the Supreme Court, it would leave "no decision in this case because said decision appealed from was already vacated upon the perfection of the appeal." *Held:* While it is true that the perfection of the appeal technically operates to vacate the judgment appealed from, the dismissal of the case before it is finally decided by the appellate court does not result in the total deletion or wiping out of the judgment of the court *a quo.* On the contrary by specific provision of the Rules of Court, the decision of the lower court shall stand as though no appeal had ever been taken and become enforceable. (Sec. 2, Rule 52).

PROVISIONAL REMEDIES

Attachment

Under Rule 59, sec. 5, the party applying for the order of attachment must leave a bond executed by the defendant in an amount to be fixed by the judge not exceeding the plaintiff's claim, that the plaintiff will pay all the cost which may be adjudged to the defendant and all damages that he may sustain by reason of the attachment, if the court shall finally adjudge that the plaintiff

[71] G.R. No. L-15285, Sept. 15, 1961.
[72] Rosete v. Rosete, G.R. No. L-15055, July 21, 1961.
[73] G.R. No. L-17287, Dec. 20, 1961.

was not entitled thereto. The Supreme Court clarified this provision in the case of *Lazatin v. Twaño,*[74] by holding that the attachment defendant is not entitled to moral damages unless it is alleged and established that the writ was maliciously sued out. Where there is no issue of malice, the attachment defendant is required to recover only the actual damages sustained by him by reason of the attachment. Where the attachment is maliciously sued out the damages recoverable may include a compensation for every injury to his credit, business or feelings.

Injunction

In *Manuel Regalado v. Constabulary Commander of Negros Occidental,*[75] our Supreme Court reiterated the ruling in *Iloilo Commercial v. Public Service Commission*[76] that the Court of First Instance has no authority to issue an injunction against the Public Service Commission or any other court or semi-judicial body of equal rank.

Courts are not too strict in contempt cases if not palpable

In the *Malalos v. Reyes*[77] case petitioner was ordered to pay a fine of ₱100 and imprisoned for 10 days for direct contempt. He requested that imprisonment be eliminated. *Held:* Considering that the utterances are not so serious as those made in other cases, petitioner was merely sentenced to pay fine.

Reentry into properties sold in an execution sale by judgment-debtor in an ordinary action for collection or rentals does not constitute contempt

In cases other than forcible entry and detainer case, reentry by the judgment debtor in the property sold in an ordinary execution sale will not constitute contempt of court but would only give the purchaser or his heirs a cause of action for forcible entry against said debtor.[78]

SPECIAL CIVIL ACTIONS

Certiorari

In the case of *Phil. Plywood Corp. v. National Labor Union,*[79] the court held that the resolution of the respondent court sitting

[74] G.R. No. L-12786, July 31, 1961.
[75] G.R. No. L-15674, Nov. 29, 1961.
[76] 50 Phil. 38.
[77] G.R. No. L-16185, Oct. 31, 1961.
[78] Faustino Laguinos v. Justice of the Peace of Camiling, et al., G.R. No. L-14345, July 20, 1961.
[79] G.R. No. L-15190, May 30, 1961.

en banc denying the motion for reconsideration of the decision appealed from was promulgated on June 30, 1959 and that on March 11, 1959, the corporation filed a notice stating that it will appeal said decision to the honorable Supreme Court, in accordance with the provision of Sec. 14 Com. Act 105, which gives to the aggrieved party ten days from the date of the award of the order or decision within which to appeal therefrom to the Supreme Court by writ of *certiorari.* Considering that said notice given forty days after said date, and that the present petition for certiorari was filed on April 10, or over two months after the expiration of the ten-day period, it is clear that the case at bar cannot be considered as an appeal by *certiorari* and must be dealt with only as a *special civil action of certiorari.*

Certiorari is not the remedy to obtain a review of the decision which has become final

In *Francisco v. Caluag,*[80] the Supreme Court did not entertain a petition for *certiorari* on the ground that the decision has already become final. The respondent Judge rendered a decision based on *ex-parte* evidence of the plaintiff presented to the clerk of court who was commissioned to receive evidence. After three motions for reconsideration has been denied, petitioner filed *certiorari.* It is very apparent that when the petition for *certiorari* was filed, the decision has long become final.

Sec. 1, Rule 67 is explicit that for a writ of *certiorari* to issue it must not only be shown that the board, tribunal or officer acted without or in excess of jurisdiction or in grave abuse of discretion but also that there is no appeal or other plain, speedy and adequate remedy in the ordinary course of law available to the aggrieved party. In the case of *Jose v. Zulueta,*[81] it is not disputed that the court's order directing the issuance of the alias writ of execution in question as well as that order denying respondent Zulueta's motion for reconsideration of the aforesaid order, not being interlocutory were appealable. No appeal from said orders however was interposed within the reglamentary period nor any reason given for such failure. Under the circumstances, and the right to appeal having been lost, a petition for *certiorari* is not proper.

It is true that in several instances, this court allowed petition for *certiorari* notwithstanding the existence of an appeal therein. It may be pointed out however that in those instances, the orders complained of were either issued in excess of or without jurisdiction

[80] G.R. No. L-15365, Dec. 26, 1961.
[81] G.R. No. L-17867, April 21, 1961.

or that for certain special consideration, as public welfare, public policy, this court has decided to entertain the action. In other words, those are exceptional instances where the provision of sec. 1, Rule 67 above quoted are not strictly applied.

In the case of *City of Manila v. Macadaeg* [82] the court ruled that it is undeniable that this special civil action was filed on March 2, 1959 more than 30 days after the City Fiscal received (Jan. 8, 1959) the court's resolution denying his motion for reconsideration; therefore, this action attempts in effect to obtain a revision of the original order fixing the commissioners compensation after the city had lost their right to appeal from it. Our Supreme Court has ruled against such attempts in the form of *certiorari.* Although in some instances, the court has entertained petitions to revoke some order or decision, even after the time to appeal had elapsed those were cases wherein the jurisdiction of the Court has been exceeded. Here there is no question that the court has the power to fix and order the payment of the commissioner's fees. Granting that he disregarded the rules he merely erred and such error should have been corrected by appeal in due time.

Mandamus is not the remedy if superior administrative officers can grant relief

In the case of *Perez v. City Mayor,*[83] petitioner as chief of Nueva Ecija Provincial Hospital filed a petition for mandamus to compel the respondent to appropriate a sum as required by the Hospital Financing Law. Said law vest upon Secretary of Health, the supervision and control over all government hospitals. Pursuant thereto he issued Circular No. 262 which provides: "The Secretary of Finance upon the recommendation of the Secretary of Health and Auditor General shall order the withholding of the amount needed in case of the failure of the part of the City or Provincial government to remit their obligations." *Held:* The most that petitioner could do is to report to a superior official the failure of the respondent to set aside that the city of Cabanatuan is obliged to give for support. The action for *mandamus* is premature.

In the case of *Sanchez v. Francisco* [84] it appeared that petitioners were policemen, all civil service eligibles, they were dismissed for electioneering after investigation conducted by the Municipal Council. After receiving the notice of their dismissal the petitioners appealed to the commissioner of civil service but on Feb. 7, 1954,

[82] G.R. No. L-16248, Nov. 15, 1961.
[83] G.R. No. L-12573, Dec. 28, 1961.
[84] G.R. No. L-12539, March 16, 1961.

two years later, they discovered that the records of the investigation were not forwarded to that office. It was concluded by the CFI that the Mayor "pigeon-holed" the appeal. *Held:* It being obvious that the administrative investigation against petitioners has not been disposed of, the proper remedy is not *mandamus* but to prosecute their appeal. The Supreme Court ordered respondents to transmit records to commissioner of civil service.